IN THE

Supreme Court of the United States

October Term, 1955

No. 926

THEODORE F. OTTEN, *Petitioner,*

vs.

STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Respondents.

OPPOSITION OF RESPONDENT BROTHERHOOD TO PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the District Court is reported in 132 F. Supp. 836, and is printed as Appendix A to the Petition for Certiorari. The opinion of the Court of Appeals affirming the District Court is reported in 229 F. 2d 919, and is printed as Appendix B to the Petition. The opinion of the Court of Appeals in an earlier appeal is reported in 205 F. 2d 58, and is printed as Appendix C to the Petition.

JURISDICTION

Petitioner invokes the certiorari jurisdiction of this Court under Title 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Is Section 2, Eleventh of the Railway Labor Act (45 U.S.C. § 152, Eleventh), added to the Railway Labor Act in 1951, repealing in part the prior federal prohibition of a union shop in the railroad industry, a constitutional exercise by Congress of its power to regulate interstate commerce.

2. Has Petitioner, whose employment was terminated because of his refusal, motivated by his religious beliefs, to comply either with a union shop agreement entered into by his employer or with special arrangements made by the Brotherhood to accomodate his religious beliefs, been deprived of his constitutional rights to freedom of religion, freedom of association, and property.

STATUTE INVOLVED

Section 2, Eleventh of the Railway Labor Act provides in part:

> "Eleventh. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—
>
> "(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or of the effective date of such agreements, which-

ever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership."

STATEMENT OF THE CASE

From 1934 to January 10, 1951, the Railway Labor Act (U.S.C. Title 45, Sections 151 et seq.) prohibited closed shop or union shop agreements in the railroad industry. On the latter date the Act was amended so that it no longer prohibited union shop agreements falling within a certain description. (64 Stat. 1238; U.S.C. Title 45, Sec. 152, Eleventh.) On August 28, 1951, effective September 1, 1951, the Intervenor-Defendant-Respondent (hereinafter referred to as the "Brotherhood") and certain other railway labor organizations entered into an agreement with the Baltimore & Ohio Railroad Company and subsidiary companies, including The Staten Island Rapid Transit Railway Company (hereinafter referred to as the "Carrier"). This agreement provided for a union shop within the description of such contracts the prohibition of which had been repealed.

At the time of making the agreement and of its effective date, Petitioner was employed by the Carrier as a third-rail maintainer, a position within the craft

which at all pertinent times has had the Brotherhood as its collective bargaining representative. R. 1.[1] Petitioner had been a member of the Brotherhood for some years, but in June 1948 his membership ceased; he submitted a resignation because his religious beliefs precluded his "yoking" himself with others except in his religious fellowship. R. 1-3.

While the Brotherhood and the Carrier were negotiating the union shop agreement, Petitioner knew at least as early as July 1951, and apparently earlier, that such negotiations were being conducted. R. 1, 3, 5-7. He discussed the subject with some of his co-workers during that period, but did not advise the union of his views. R. 6-7. During the period Petitioner had been a member of the Brotherhood, he received copies of a weekly newspaper published by the railway labor organizations which gave accounts of railway union activities (R. 5, 16), and received the monthly Electrical Workers Journal which contained briefer accounts of railway labor activities. R. 15. He knew that these publications contained such accounts, but after the termination of his membership in the Brotherhood he made no effort to keep himself informed through those publications of the activities of his collective bargaining representative. R. 5. Also, he knew he could have asked members or officers of the Brotherhood for more information concerning the negotiations for a union shop agreement and the terms being discussed, but did not do so. R. 6.

In September 1951, after the effective date of the union shop agreement and well within the 60-day

[1] All Record references herein are to the Appendix to the Brief of "Intervenor-Defendant-Appellee" filed in the Court below, copies of which have been filed in this Court.

period provided therein, Petitioner received a letter from the Brotherhood advising him of its terms and of his failure theretofore to comply, and inviting him to membership. He did not reply to that letter but instead wrote to the Carrier stating his objection to membership in the Brotherhood because of his religious beliefs. R. 3, 5-6. Petitioner continued to fail to comply with the condition of continued employment to which the Carrier had subscribed in the union shop agreement but remained in the employment of the Carrier.

The Brotherhood offered to make a special exception for Petitioner. In a written communication to him it offered to except him from any requirement of joining or maintaining membership in the Brotherhood if he would pay to the Brotherhood, for its services as collective bargaining representative, the amount of the initiation fee minus the usual amount of $2.00 included therein for insurance, and the amount of the monthly dues minus $1.20 included therein for death benefits and minus $1.60 included therein for the pension fund. R. 7. That offer was never withdrawn, and Petitioner never accepted it. R. 8-9. On September 10, 1952, Petitioner was still in the service of the Carrier, and the Brotherhood advised the Carrier of the special arrangements it was willing to make to accommodate Petitioner. At no time was Petitioner told he would have to subscribe to any obligation to the union and he was never asked to undertake any such obligation. R. 7, 9.

Petitioner persisted in his refusal to comply with the terms of the union shop agreement or to avail himself of the opportunity offered him to continue in employment without joining the union. The procedures of the union shop agreement were finally invoked.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs taxed in favor of the intervenor-appellee.

A. Daniel Fusaro,
Clerk.

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Clerk.

Petitioner took appeals and obtained hearings as therein provided, and was finally advised his employment would be terminated on September 29, 1952, almost a year after he had failed to comply with the agreement.

He thereupon filed suit in the District Court. He asked that Court to convene a three-judge court pursuant to 28 U.S.C. Sections 2282 et seq., since he sought to enjoin the operation of a federal statute for repugnance to the Constitution. The District Court held that the contentions of unconstitutionality were so insubstantial as not to warrant convening a three-judge court, refused to convene a three-judge court, and denied a preliminary injunction. The denial of the preliminary injunction and the refusal to convene a three-judge court on the ground of insubstantiality of the constitutional contentions were appealed to the Court of Appeals and affirmed (205 F. 2d 58), and Petitioner's employment by the Carrier was finally terminated on March 1, 1953, a year and a half after the effective date of the union shop agreement. R. 3, 4.

On remand of the case to the District Court, Petitioner insisted on proceeding with a trial on the merits of his request for a permanent injunction and damages. Although the Court of Appeals had held that the 1951 amendment to the Railway Labor Act was constitutional, and that a contention to the contrary did not raise a substantial question, it did not order the complaint dismissed; the only action taken was affirmance of the orders of the District Court refusing to convene a three-judge court and denying a preliminary injunction, since such were the only issues technically pending before it. The facts developed at the trial after remand were essentially the same as before

the Court of Appeals on the first appeal, with additions and embellishments some of which are recited herein. The District Court filed an opinion, findings and conclusions, and entered an order dismissing the complaint on the authority of the earlier Court of Appeals decision. 132 F. Supp. 836. On appeal, the Court of Appeals affirmed per curiam. 229 F. 2d 919.

Petitioner, at the time of the termination of his employment by the Carrier, was third on the seniority roster of third-rail maintainers, and the Carrier employed three such employees. One month later, on April 1, 1953, the Carrier discontinued a portion of its third-rail operations, and since then has required and employs only two such employees. R. 13-14. Since March 1, 1953, because of a physical injury, Petitioner has been physically incapable of performing some of the duties of the position in which he had been employed. R. 9-10. In addition, since September 18, 1954, Petitioner has been receiving a disability pension for total disability. R. 4.

ARGUMENT

The basic issue raised by the Petitioner is the constitutionality of Section 2, Eleventh of the Railway Labor Act, added to the Act by amendment of January 10, 1951. That is the same issue as is involved in *Railway Employes' Dept., American Federation of Labor, et al.* v. *Robert L. Hanson, et al.*, No. 451, argued in this Court on May 2, 1956. In that case we set forth the reasons why we believe the federal legislation under attack is valid. If this Court reverses the decision of the Supreme Court of Nebraska in the *Hanson* case, then a fortiori the decision below in this case was correct. This case does not involve any question of

federal legislation superseding state legislation. In the *Hanson* case even the Supreme Court of Nebraska expressed the view that insofar as the legislation repealed the federal prohibition it was valid, and held (erroneously, we believe) that it was invalid because it superseded a state prohibition.

Also, this case is almost indistinguishable from *Wicks* v. *Brotherhood of Maintenance of Way Employes, and Southern Pacific Company,* and *Jensen* v. *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, and Union Pacific Railroad Company,* decided by the Court of Appeals for the Ninth Circuit in accord with the decision below in this case, except that the facts here are perhaps even more favorable to respondent than in the *Wicks* and *Jensen* decision. A petition for certiorari to review that decision is now pending in this Court, No. 808. In our opposition to that petition, we set forth the reasons why we believe certiorari should be denied, and we will not repeat those reasons here in support of this opposition. Should we be wrong in the opposition there expressed, and should this Court grant certiorari in the *Wicks* and *Jensen* petition, we would not oppose a grant of a writ of certiorari in this case. But we call the attention of the Court to certain facts that have developed in this case since the Complaint was filed which indicate that the controversy has become largely moot. It appears that only one month after Petitioner's employment was terminated the Carrier reduced its third-rail operations and reduced the number of third-rail maintainers from three to two. R. 13-14. Petitioner was third on the seniority roster of third-rail maintainers. It thus appears that even

had his employment not been terminated because of the union shop agreement, he would have become unemployed one month later for lack of work. Also, since September 18, 1954, Petitioner has been receiving a pension based on total physical disability. R. 4. It thus appears that the important issue in this case, whether Petitioner is entitled to be reinstated in his employment because it was improperly terminated, has become moot, and that the only issue left is whether he is entitled to recover some damages for the relatively short period of time he was unemployed because of the termination of his employment pursuant to the union shop agreement. Such a question would not normally be the subject of a petition for certiorari, especially when the same issues are raised in other cases of greater consequence.

CONCLUSION

The decision below was plainly right, and review by this Court is not necessary in this case to establish that principle. The petition for certiorari should be denied.

Respectfully submitted,

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SUPPLEMENTARY STATEMENT

Since the foregoing was printed, this Court decided *Railway Employes' Dept.* v. *Hanson,* No. 451, on May 21, 1956, upholding the validity of the 1951 Amendment as applied in States having so-called right-to-work laws. (New York does not have such law.) In the first paragraph of our argument, *supra,* this case was discussed on the hypothesis of such eventuality. The argument there made now has applicability on the basis of such hypothesis being fact.